No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1942

BENJAMIN MCNABB, FREEMAN MCNABB, AND RAYMOND MCNABB, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the circuit court of appeals (R. 40–52) is reported at 123 F. (2d) 848.

JURISDICTION

The judgment of the circuit court of appeals was entered December 6, 1941. Rehearing was denied on January 8, 1942. A motion for leave to proceed *in forma pauperis* and a petition for a writ of certiorari were filed February 13, 1942. Both were granted June 8, 1942 (R. 53). The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioners' extrajudicial admissions were admissible in evidence against them.

STATEMENT

Petitioners were convicted in the United States District Court for the Eastern District of Tennessee of second-degree murder for the killing of Samuel Leeper while he was engaged in the performance of his official duties as an investigator of the Alcohol Tax Unit of the Bureau of Internal Revenue. Each petitioner was sentenced to imprisonment for a term of forty-five years. On appeal to the Circuit Court of Appeals for the Sixth Circuit, the judgments of conviction were affirmed.

THE EVIDENCE AS TO THE CRIME

On the evening of July 31, 1940, Officers Leeper, Jones, Abrams, and Renick, attached to the Alcohol Tax Unit, drove with two informers to the McNabb

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In their petition for certiorari the petitioners contended that the trial court committed reversible error in permitting witnesses Jones and Larkin to testify, although their names were omitted from the list of witnesses furnished to the defendants in accordance with Section 1033 of the Revised Statutes, 18 U. S. C. 562. This contention has now been abandoned and, in any event, as shown in our memorandum in response to the petition, is wholly without merit. See also *Segurola* v. *United States*, 275 U. S. 106. Petitioners have also abandoned their contention that the convictions are not supported by the evidence, evidently because it is plain that, if their extrajudicial admissions were properly admitted, there was abundant evidence to support the verdict.

settlement in eastern Tennessee in order to arrest members of the McNabb family for delivering whisky on which internal revenue taxes had not been paid (T. 24–25, 27, 29, 41–44, 46).[2] About one hundred yards away from the meeting place the officers got out of the car (T. 25, 29). The informers drove on and met the petitioners Benjamin, Freeman, and Raymond McNabb, and two other McNabbs, Emuil and Barney, who were tried with petitioners but acquitted[3] (T. 25). While the whisky was being loaded into the car, out of the nearby McNabb cemetery, someone called a warning (T. 25, 30, 38). One informer flashed a prearranged signal with his light and the officers ran toward the car; Officer Jones called in a loud voice, "Alright boys, Federal Officers." (T. 25, 26, 30, 34–35, 38, 41, 44–45, 55.) The informers drove off (T. 25, 35, 45). The McNabbs began running at Jones' outcry and disappeared (T. 30–35, 38).

The officers began at once to spill the whisky on the ground, using their flashlights to see (T. 30, 35–36, 38, 46). While thus engaged, a good-sized rock was thrown in their midst (T. 36, 38) and presently they heard someone mumbling over at a

[2] Only that part of the record has been printed which contains the evidence heard in the absence of the jury on the admissibility of the petitioners' extrajudicial admissions. It will be designated by the letter "R." The designation "T." refers to the typewritten transcript filed with the Clerk.

[3] The court, with the consent of the Government, directed verdicts of not guilty as to Emuil and Barney McNabb (T. 183).

little gate near a corner in the cemetery (T. 31, 36, 41). Shortly thereafter Leeper, who had gone inside the cemetery, was shot (T. 31, 36, 38, 39, 45). Renick went to his assistance and after a few minutes he, too, was shot (T. 31, 39). Renick recovered, but Leeper died (T. 9, 32).

After their arrest the petitioners made admissions which were accepted as evidence at the trial. Benjamin made the following statements: He helped to load the whisky and that it was he, as he ran, who stopped and threw the rock at the officers (T. 130, 147, 153, 163, 170). At a small gate in a corner of the cemetery he met Raymond and Freeman. Freeman handed him a shotgun and both Raymond and Freeman urged him to go and shoot at the officers. Accordingly, he went to a point where his view was unobstructed and fired a shot at the flashlights. After firing he reloaded with a shell which Freeman gave him and gave the gun to Freeman or Raymond. As he left, he heard a second shot. (T. 118, 130, 134, 137–138, 142–143, 148–149, 153–154, 161, 163.)

Freeman admitted that he had made the arrangements for the sale of the liquor and had shouted the warning (T. 129, 133, 138–139, 141, 156, 166–167, 169). He also admitted that he had carried the shotgun to the cemetery intending to shoot anyone who attempted to take his whisky (T. 129, 138, 140), that he had witnessed the shooting, and that he had given Benjamin another shell with which to reload the gun (T. 154); but he in-

sisted that he had told Benjamin not to shoot because "they were officers down there" (T. 153).

Raymond admitted that he had met Benjamin and Freeman at the corner of the cemetery and that he was present when Benjamin was given the gun and when the shot was fired by Benjamin (T. 118, 138, 139, 156). At first Raymond said that Benjamin had fired two shots but later stated that Benjamin had fired only one (T. 166). He denied that he had urged Benjamin to "Pour it on them" (T. 153, 166).

THE EVIDENCE AND FINDINGS AS TO THE CIRCUMSTANCES UNDER WHICH THE ADMISSIONS WERE MADE

To determine whether the admissions made by the three petitioners were admissible in evidence, the trial court conducted a preliminary examination in the absence of the jury (R. 1, 3). From the testimony adduced it appeared that the statements were made under the following circumstances:

Freeman McNabb and Raymond McNabb were arrested,[1] together with their brother Emuil, at one or two o'clock on the morning of August 1, 1940,

[1] Petitioners assert that the officers arrested Freeman and Raymond without "a complaint or warrant of any kind" (Br. ——). The record does not show whether a warrant of arrest had been obtained, but it is clear that, in any event, the arrests were lawful since both of them were seen at the scene of the crime (*supra*, p. 3), thus giving the officers probable cause to believe that Freeman and Raymond participated in the commission of a felony which was in fact committed. See Michie's Tennessee Code of 1938, § 11536, and 18 U. S. C. 550.

and were taken to a detention room in the Federal Building in Chattanooga, Tennessee (R. 28, 29, 31). The room was bare of any cot, chair, or stool (R. 13). They were left there until four or five o'clock, in the afternoon without being questioned and then were taken to the Hamilton County jail (R. 12, 28, 29, 32). During the day they had been given sandwiches to eat (R. 13).[5] Barney McNabb was taken into custody in the morning; he was questioned by the officers and taken with them when they went over the scene of the crime (R. 2, 30).

When they were arrested, the defendants volunteered to make statements (R. 9) and consequently in the late afternoon or evening of August 1 the officers began to question some of them.[6] Officer Taylor, who was in charge and did most of the questioning (R. 4, 11, 28, 36, 37), testified (R. 34):

> I told each of them before they were questioned that we were Government Officers, what we were investigating, and advised them they did not have to make a statement,

[5] Freeman and Raymond both testified that during this period they were given nothing to eat (R. 28, 29, 32). But the resolution of this and other conflicts in the testimony was for the trial judge. See Brief for United States in *Anderson v. United States*, No. 10, this Term, p. 57. In setting forth the facts, therefore, we shall resolve all conflicts in favor of the Government but shall indicate the testimony of the petitioners either in the text or a note.

[6] We shall use the term "defendants" to describe all five who were defendants at the trial, including the three petitioners, and will refer to the petitioners as such when there is reason to distinguish them from Barney and Emuil.

> that they need not fear force, and that any statement made by them would be used against them and that they need not answer any questions asked unless they desired to do so, and I asked each of them if the [sic] understood that. I talked to each of them individually and each of them said they so understood. I told them that if they did answer the question to tell the truth, but that they had a right to refuse to answer if they wished. After they understood what I had told them I then proceeded with the questioning. * * *

Officer Beman, who was present whenever Raymond was questioned (R. 8, 26) and who took Benjamin's confession (T. 146), also stated that the defendants' constitutional rights were explained to them (R. 7).[7]

The questioning on the evening of August 1st may have lasted until some time around midnight (R. 19, 34, 36).[8] The defendants were

[7] The defendants denied that they were advised of their rights (R. 28, 29, 32, 33).

[8] Two of the officers so testified, but Officer Kitts stated that the questioning began at 7 and ended around 10 (R. 14) and Officer Burke stated that different defendants were questioned at different times from 6 until 11 (R. 22). Emuil testified that he and his brothers, Freeman and Raymond, were "kept" in the Alcohol Tax Unit office that evening for three or four hours, until 9 or 9:30, during which time some one "talked" to him (R. 28). Taking into account Barney's obvious confusion as to dates and his erroneous assumption that he was in custody three days before the final interrogation, his testimony was that

brought in individually at various times and questioned "some of them half an hour or maybe an hour, or maybe two hours" (R. 14, 19, 22). The evidence does not reveal how long any particular defendant was questioned that evening. Officer Beman stated that Raymond was interrogated for about half an hour that day (R. 7).[9] Freeman, according to his testimony, was brought from the jail for questioning "two or three times, some in the afternoon and some at night" (R. 29).[10]

On the following day, August 2, the questioning was continued. Officer Taylor testified, "I had

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he was kept at the federal building that night from 8 or 9 o'clock to 10 or 11 (R. 30).

[9] According to Raymond's testimony, he was questioned only once, *i. e.* between 11 at night and 2 or 3 in the morning (R. 32). Raymond testified that this was on the night of August 1, but it seems that he was confused as to dates for these hours correspond to the hours on the night of August 2 during which the defendants were questioned.

[10] Freeman's testimony as to the periods he was kept at the federal building is contradictory and confusing. The first occasion on which the defendants were questioned was in the late afternoon of August 1st and they were not questioned after 2 or 3 o'clock in the morning of August 3. But Freeman testified that he stayed in the detention room until late the evening of August 1st, was then brought downstairs and questioned, taken to the jail, brought back after an hour, and taken back to the jail at 11 o'clock. He also testified immediately thereafter that "They brought me back two or three times, some in the afternoon and some at night." As to August 2nd he said that he was kept at the federal building from about 7 at night until "long after midnight," and that the next night (August 3rd) the officers came to the jail and got them at 11 o'clock and questioned them until 2. (See R. 29.)

them back down the next day, probably about nine or nine-thirty. We had them back and forth most of the day. I questioned four of them practically all day" (R. 36; see also, R. 15–16, 19–20, 22). On this day, as during the previous evening, no one was questioned continuously but only intermittently for 20-minute or half-hour periods (R. 7, 20, 22, 26). Taylor would question one, send him back, try to reconcile the facts, and then question another (R. 35). The stories of the defendants "did not fit with the physical facts, and statements of their own crowd," so the officers "would put two of them together" and "they [the defendants] could not reconcile their differences" (R. 35). It is difficult to break up the questioning among the defendants. Barney testified that he was taken to the Federal Building for questioning at 8 or 9 and was kept there until noon (R. 30). Raymond, according to Officer Beman, was questioned "probably three times" during the day for "probably 15 or 20 minutes or half an hour at a time" (R. 7, 8). Freeman did not mention that he was questioned that day and the officers were not asked about him specifically. Early that evening, however, Freeman was questioned for about three and one-half hours (R. 36).

Benjamin came to the Federal Building with his parents and two friends on the morning of August 2 and declared that he wanted "to make an explanation of his whereabouts on the day before" (R.

14, 25, 26, 27). The officers first asked him to remove his clothes, which he did, and they examined him for two or three minutes to verify a report they had that he had been injured by a stray shot (R. 36, 37); Benjamin testified that this scared him "pretty much" (R. 33). The officers then took down his statement (R. 26). Later, about noon, he was confronted with the accusation made by the others that he had fired both shots (T. 134, 146–149, 162–164, 169).[11] Immediately, Benjamin confessed, saying (R. 26):

> If they are going to accuse me of that, I will tell the whole truth, you may get your pencil and paper and write it down.

He explained that he had told a false story at first because the defendants "made an agreement to tell they were not about the graveyard on that night and they agreed to stick to it" (T. 143). After

[11] Benjamin denied that he had made such a statement (R. 33).

[12] It seems likely that it was Barney's written statement with which Benjamin was confronted (T. 146; cf. T. 155–156). That Barney accused Benjamin of shooting both shots is disclosed by the officers' testimony that Benjamin admitted seeing Barney right after the shooting (T. 164) and that Barney, on August 1, said "he had been told by other persons what had happened" (T. 159) and that after he heard the shots that night "one other person [Benjamin] came to the river and told him that he, this person [Benjamin] who came to the river, had done the shooting" (T. 160). (The word "person" was used by the officers when testifying to avoid mentioning the defendants' names if they had not been present when incriminating statements were made as to them.)

Benjamin had been warned again of his constitutional rights (T. 162), he made a detailed statement, marking his movements on a map, in which he confessed his part in the crime, admitting that he fired the first shot but denying the accusation that he also fired the second shot (see p. 4, *supra*). The confession was taken down by a stenographer in question and answer form while Officer Beman asked the questions. (T. 146, 169).[13]

About ten or eleven o'clock that night all the defendants were brought back from the jail to the Federal Building and questioned again, sometimes separately and sometimes together (R. 7–8, 16, 17, 22–23, 35). Officer Beman explained (R. 9):

> There were certain discrepancies in their stories, and we were anxious to straighten them out, and the best way to do it was to get all five of them together, they all having stated they were anxious to tell the truth about it. That was the reason for bringing them down the last time.

They were kept for two, and possibly three, hours,[14] "discussed the whole affair among themselves" (R. 35), and made statements which were consistent

[13] The record does not show why the written confession was not introduced in evidence but we are informed that it was not introduced because it was not signed by Benjamin.

[14] Officers Jakes and Kitts testified that the defendants were kept at the Federal Building from about ten until around midnight or after (R. 16, 20, 22, 23); Officer Beman stated that Raymond was sent back to the jail at nine or ten and later brought back to the Federal Building and kept there until between one and two (R. 7–8). The de-

with each other and with facts known to the officers (R. 9, 23). In brief, Benjamin, who had already made a complete confession, did not change his story. Freeman and Raymond admitted that they had been present at the shooting; Freeman also admitted that he had taken the gun to the graveyard to shoot anyone interfering with the sale of the whisky, and that he had given Benjamin a shell with which to reload (see pp. 4–5, *supra*). But Freeman and Raymond were cautious in their admissions. Both contradicted Benjamin's statement that they had urged him to shoot (T. 153, 166) and Freeman insisted that he had told Benjamin not to shoot because "they were officers down there" (T. 153). Barney described the events preceding the shooting but said that he had left the scene when the officers cried out to them (T. 130–131, 151–152, 159). Emuil made no admissions (T. 141).

During the time that they were actually being questioned the petitioners did not see their families or friends. On one occasion some relatives and a friend were denied leave to see Freeman and Raymond when they were in the detention

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fendants set the time somewhat later and the period a little longer: Freeman said he was questioned from eleven until two, but was kept until three or three-thirty (R. 29); Raymond and Barney said they were brought down around eleven and kept until between two and three (R. 30–31, 32). Benjamin testified merely that he had something to eat and played a pin ball machine in a restaurant "on the way to jail" that night "some time around three o'clock (R. 33–34).

room (R. 27). But there was evidence that relatives of the petitioners were in an adjoining room during the questioning (R. 23, 27). And although the record is not clear, it seems that the petitioners were allowed to see their families at the jail when they were not being questioned (R. 27, but see R. 36). The petitioners did not have the benefit of counsel (R. 29, 33, 36) but there is no evidence that they requested counsel.

The testimony was conflicting as to whether any promises or threats were made and as to whether petitioners were subjected to abuse and violence. Freeman and Raymond testified that they were told that they would be given light sentences and allowed "to make bond" if they confessed (R. 29, 32). Benjamin testified that the officers told him that if he told the truth "they would make it lighter on me, but if I didn't they would burn me up in the electric chair" (R. 33). The three officers who, between them, did all of the questioning—Taylor, Beman and Kitts (R. 7; 14, 15; 36, 37)—testified, however, that no promise or inducement or other reward was offered to petitioners (R. 2-3, 8, 23, 26, 37). Likewise, the officers denied the assertions (R. 29, 32; 33) that they had cursed and abused the petitioners and threatened them with physical violence (R. 2; 8, 9, 10, 18, 23, 34, 35, 37). There was evidence that the officers gave the petitioners sandwiches, coca-colas, and cigarettes during the questioning and that on several occasions

the officers took them across the street "to buy what they wanted" (R. 2, 16, 18, 20, 35, 36).[15] And there is no suggestion that their regular meals were not served them at the jail.

All three petitioners have lived in the McNabb community all their lives, have gone through only the fourth grade in school, and have been no farther away from home than Jasper, Tennessee, twenty-one miles away (R. 29–30, 31–32, 33). However, Chattanooga is only twelve miles from their home (R. 33), and Raymond said that he had been there "a good many times" (R. 32); Freeman, his twin, was not asked whether he had been there. Benjamin also has been to Chattanooga but did not specify how many times (R. 33). Raymond and Freeman had been in court previously, when, represented by counsel, they pleaded guilty—Freeman to manufacturing whisky (R. 30, 32).

Immediately after the Government's second witness was called to the stand and sworn,[16] the trial judge declined to hear further testimony, stating,

> I think I have a fair picture of the situation * * * and I feel this way about it; * * *. I don't see anything in this case that I could particularly disapprove except the fact these boys were put in this detention room without any seats, or without any beds,

[15] The petitioners partially denied this (R. 28, 29, 30, 32). Several of the officers had already been called as witnesses by the defendants.

and left there for some time, but I cannot see that within itself would effect [sic] their free will, or any statement they might have made (R. 38).

He also stated that (R. 38):

> In this case, from the way I see the proof, there was no questioning that would show the will of these defendants was entirely overreached. It is true that they are boys, live in the country, have not been far away from home, but it is also true that they are not entirely ignorant of the affairs of life, they have lived close to a main highway, lots of people travel, lots of people stopping along there; they have been in Chattanooga, and they are not so ignorant as some people might think. I think these boys had sense enough to know their rights, and I think the proof shows they were advised of their rights.

With reference to counsel's inquiry, "What would Your Honor think was the reaction to these midnight sessions?" the court replied (R. 38–39):

> I don't think there was any physical discomfort, it only lasted two days, I don't think that there [sic] would effect their free will. There are several elements to be considered, one is the personal element of the officer making the investigation; they are men engaged in the enforcement of the law, and have to deal with this character of crime, their line of duty does not demand that they high-pressure anybody. I appreciate the fact they would be some-

> what agitated by the killing of a fellow officer, but I don't think from the weight of this testimony that the agents overreached themselves, or imposed upon these defendants. * * * in this case I cannot see there has been any high-pressure brought on these defendants, which would override their will. I do not think they were promised immunity or reward. I cannot see any of that in this case. * * *
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> * * * * * *
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> It is my judgment that any statements made by any of these defendants, under the conditions as submitted to the Court, are admissible in evidence. * * *

When the jury was recalled, the defendants did not take the stand to relate their version of the circumstances under which their admissions were made, and their counsel contented themselves with cross-examining the officers as to such circumstances. The testimony of the officers before the jury is substantially a repetition of that given by them on the preliminary examination. (See T. 118–119, 122, 131, 133, 141–144, 147–150, 155–156, 157, 167–170; see also T. 58–60.)

SUMMARY OF ARGUMENT

I

The trial court did not err in admitting evidence of the incriminating statements made by the petitioners. The testimony was conflicting as to whether the petitioners were made to understand their rights, or were subjected to physical

violence, or cursed, abused or threatened, or offered any inducements or promises in return for their admissions. There was abundant evidence to support the trial court's findings on these issues, and they may therefore be laid aside. *Lisenba* v. *California*, 314 U. S. 219. The questioning of Freeman and Raymond was not unduly protracted, and there is no reason to suppose that their wills were overreached. It was quite clear that Benjamin told the truth voluntarily in order to repel accusations made against him.

ARGUMENT

PETITIONERS' ADMISSIONS WERE ADMISSIBLE IN EVIDENCE

In our brief in *Anderson* v. *United States*, No. 10, this Term, we have discussed at length the tests which we believe should govern the trial courts in passing upon the admissibility of a confession. We have shown that the trial judge should inquire whether the confession was "voluntary," an idea which summarizes two overlapping criteria. The first is whether the circumstances were such that the defendant's normal will not to accuse himself falsely was overcome by threats, promises or mistreatment, thus rendering his involuntary statement too unreliable for evidence. The second is whether the defendant's constitutional right to refuse to answer incriminating questions was denied him by applying compulsion to extort an answer

or by asking questions which were themselves coercive at a time when through fear or physical debility the defendant was bereft of power to assert his will. Although we urge that even if it examined the facts *de novo* the Court should conclude in these cases that the confessions were made voluntarily, we have also pointed out that the appellate court has a limited function, and that the trial judge must have a wide discretion to make his ruling, because the ultimate question of whether an extra-judicial confession was voluntary in the above senses is a question of fact which the trial judge has a far better opportunity to answer wisely than any appellate court. For the purposes of this brief we refer to that discussion for our position upon the questions of law, and enter straightly upon consideration of the ultimate factual questions.

We may lay aside at once the claims of the petitioners that they were bullied, threatened, cursed and offered promises of reward. Their testimony was contradicted by the officers (see pp. 13–14, *supra*). Likewise, the testimony of the officers establishes that the petitioners were made to understand that they need not answer questions or otherwise incriminate themselves. The court resolved the conflicts in the evidence against the petitioners and its decision on these issues is final since it is abundantly supported by the evidence. Cf. *Lisenba* v. *California*, 314 U. S. 219; *Ward* v. *Texas*, No. 974, last Term.

In the instant case, therefore, the only substantial question in respect of all three extrajudicial admissions is whether the questioning, while neither friends nor counsel were in the room, was so protracted and was carried on at such late hours as to wear down any of the petitioners so that he "was no longer able freely to admit or to deny or to refuse to answer."[17] The circumstances relevant to each confession vary sufficiently to require separate treatment. We submit, however, that in each instance they show the ruling of the trial court to be correct.

1. *Benjamin.*—The decisive fact showing Benjamin's confession to have been voluntary is that Benjamin spoke not from a sense of oppression, fear, or coercion, but deliberately in order to repel the accusations made against him by Freeman and Raymond. Officer McKinney in his testimony epitomized the way in which Benjamin came to confess (R. 26):

> Benjamin McNabb came to the Alcohol Tax Office voluntarily sometime before noon on the morning of August 2nd and said that he wanted to make an explanation of his whereabouts, and his statement was written down. Later he was confronted with the statements made by the other boys, in which the other boys had accused Benjamin of firing both shots. Benjamin thereupon said, "If they are going to accuse me of that,

[17] *Ward v. Texas*, No. 974, last Term, pamph. p. 7.

I will tell the whole truth, you may get your pencil and paper and write it down." * * *

Benjamin made his decision to confess about noon (T. 134, 146–149, 162–164, 169) and much of the five or six hours during which, according to his testimony, he was being questioned must have been consumed in reducing his confession to writing (T. 169).

Moreover, Benjamin was advised of his rights and told that he need not make any statement unless he wished (R. 34, 38); he was lawfully held in custody; there was no delay in arraignment preceding his confession; he was not held incommunicado except while he was actually being questioned; his family was in the building;[18] he never requested counsel and confessed before he had been in custody many hours.

The mere fact that Benjamin and his co-petitioners "were ignorant mountain boys, none of them having been further than the 4th grade in school and none of them having been more than 25 miles away from home before they were arrested" (Br. 5), presents no serious question as to the voluntariness of his confession. He at all times showed self-possession in making his confession; he denied parts of his confederates' accusations (R. 26) and was able to state the details of his stories minutely and to mark his move-

[18] See p. 13, *supra*.

ments on a map (T. 161–164). His claim that he was scared "pretty much" when he was asked to take off his clothes for two or three minutes, is inconsistent with the readiness with which he gave his first false statement. Moreover, there is nothing to indicate that this incident was anything more than routine, and it must be considered in the light of the findings of the trial judge who saw Benjamin and heard him testify. The court said (R. 38):

> In this case, from the way I see the proof, there was no questioning that would show the will of these defendants was entirely overreached. It is true that they are boys, live in the country, have not been far away from home, but it is also true that they are not entirely ignorant of the affairs of life, they have lived close to a main highway, lots of people travel, lots of people stopping along there; they have been in Chattanooga, and *they are not so ignorant as some people might think. I think these boys had sense enough to know their rights, and I think the proof shows they were advised of their rights.* [Italics supplied.]

2. *Raymond.*—Raymond was arrested at one o'clock in the morning of August 1st and was kept all day in the detention room (R. 12, 31–32). Like the trial judge, we disapprove of the conduct of the officers in detaining the defendants for fifteen hours in an unfurnished room. But the

circumstance is unimportant here because Raymond was not questioned for more than half an hour until he had had an opportunity for a full night's rest (see pp. 7–8, *supra*).

Except for the initial detention, the circumstances bearing upon the voluntary or involuntary character of Raymond's statements present nothing unlawful or improper. Officer Berman testified that he was present whenever Raymond was questioned and said that Raymond was questioned for "probably half an hour" on the afternoon of August 1st and "probably three times" for "probably 15 or 20 minutes or half an hour at a time" during the day on August 2nd and again between eleven and two o'clock that night (R. 7–8). It is clear, therefore, that the questioning did not last so long as to wear down Raymond's resistance and the late hour at which he was questioned on one night was certainly justified by the necessity of investigating the murder promptly. Morever, Raymond has never even suggested that he was tired by the questioning.

Whatever intangibles may have arisen from Raymond's inexperience were, as in Benjamin's case, peculiarly for the trial judge to weigh in the light of his observation of the petitioners. Plainly the record does not show that Raymond was deprived of his freedom to admit, deny, or remain silent, or that he was willing to say what the officers desired. On the contrary, even when he made in-

criminating admissions, he was careful to deny the accusation which would have seemed to him most damaging—that he urged Benjamin to "Pour it on them" (T. 153, 156).

3. *Freeman.*—Freeman was arrested at one o'clock on the morning of August 1st, about four hours after the shooting, and was taken to the Federal Building in Chattanooga and left in the unfurnished detention room until four o'clock that evening (R. 29). Between five o'clock and eleven he was kept at the Federal Building for examination but, although neither he nor the officers made it clear how much of that time was spent in questioning him, he was questioned only intermittently (see pp. 7–8, *supra*).

Although the record is not explicit, it is probable that Freeman was questioned during the daytime on August 2nd for not more than half an hour at a time (R. 36). Early that evening he was interrogated for three and a half hours (R. 36) and was brought back from the jail along with the other defendants later that night (R. 29). With reference to the early evening session, Officer Taylor testified (R. 36):

> We had Freeman McNabb on the night of the second for about three and one-half hours, I don't remember the time but I remember him particularly because he certainly was hard to get anything out of. He would admit he lied before and then tell it all over again. I knew some of the things

> about the whole truth and it took about three and one-half hours before he would say it was the truth, and I finally got him to tell a story which he said was true and which certainly fit better with the physical facts and circumstances than any other story he had told. It took me three and one-half hours to get a story that was satisfactory * * *.

In other words, Taylor's testimony describes the questioning of a man who said that he was glad to answer questions but who would admit that he lied and would then repeat the lie over again. Such a man would be aptly characterized as "hard to get anything out of" and explains why Taylor continued to question him for three and a half hours. Thus, it appears that after Freeman realized the incredibility of his false story in view of the known physical facts and its inconsistency with the versions given by the other defendants, he decided to tell a consistent story which he believed would not at the same time incriminate him. Hence, he at no time admitted Benjamin's statement that he had urged Benjamin to shoot, and insisted that he told Benjamin not to shoot because "they were officers down there" (T. 153). Freeman's self-possession in minimizing his part in the crime goes far towards showing that he remained a free agent; if words were being put in his mouth because he was too tired to deny them, he would doubtless have also been forced to admit Benjamin's accusation.

Furthermore, Freeman's failure to complain either of lack of sleep or of the length of the questioning strongly suggests that he believed that he had no cause to complain on those accounts. And, his silence on the point also suggests the possibility that he was strong enough not to suffer from lack of sleep and phlegmatic enough not to be upset by the intermittent questioning.

Accordingly, it cannot be said that the trial judge acted against the weight of the evidence in finding that Freeman's statements were voluntary and therefore admissible. His situation compares favorably with that of the defendant James in *Lisenba* v. *California*, 314 U. S. 219. James had been questioned constantly for 8 or 12 hours whereas Freeman had been questioned for only three and one-half hours on that day and intermittently during a six hour period the day before. Freeman, like James, showed self-possession in making his confession; he denied parts of his confederates' accusation. Neither James nor Freeman had the assistance of counsel when they made their incriminating admissions, although James had requested counsel and Freeman did not. Freeman was held with close relatives and friends for only two days and was held lawfully whereas James had been in custody two weeks at times in violation of law. The decisive circumstance, however, is that Freeman had no period of torture to recall during the final ques-

tioning whereas on the previous occasion, James had been subjected to 42 hours of constant questioning. The ruling that Freeman's confession was admissible is correct, therefore, under the authority of *Lisenba* v. *California, supra.*

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted.

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